IN THE

Supreme Court of the United States

October Term, 1960

No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, *et al.*,

Appellants,

against

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., *et al.*,

Appellees.

BRIEF OF AMERICAN JEWISH COMMITTEE and ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICI CURIAE*

Interest of the Amici

The American Jewish Committee, formed in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

> The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful

assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto.

The B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

The American Jewish Committee and the Anti-Defamation League of B'nai B'rith are gravely concerned with the issues presented by this case. Freedom of religious belief, observance and worship, both organizations are firmly convinced, can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. The organizations have always regarded the constitutional principle of separation of Church and State as one of the foundations of our American democracy and a bulwark of religious freedom.

Consistent with their purposes, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are opposed to all manifestations of religious discrimination, including those involved in this case.

For these reasons, the two organizations join in filing this brief *amici curiae* with the consent of the parties.

Statement of the Case

The Court below summarized the facts in this case, most of which were stipulated, as follows:

This lawsuit was instituted by Crown Kosher Super Market of Massachusetts, Inc., a corporation operating a kosher supermarket in Springfield, Massachusetts, and three named customers thereof, suing on behalf of themselves and others similarly situated, and by a rabbi suing on behalf of himself and other rabbis similarly situated. The plaintiffs sought a declaration that certain provisions of the Lord's day statute of Massachusetts are unconstitutional, as applied to the plaintiffs.[1] They also sought preliminary and final injunctions restraining the enforcement of such provision.

The corporate plaintiff's supermarket offers for sale all categories of food. All of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher. It is apparently the only store of this kind within a 26-mile radius of Springfield.

The four officers and stockholders and the six directors of the corporate plaintiff are all adherents of the Orthodox Jewish faith and duly observe the Jewish Sabbath from sundown on Friday to sundown on Saturday. A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath.

The due observance of the Jewish Sabbath requires total abstinence from business and work. Riding in auto-

1. The relevant provisions of the Lord's Day Act of Massachusetts (M. G. L. A., Ch. 136) are set forth in the appendix.

mobiles or other conveyances is forbidden. The religious belief of the officers, directors and stockholders of the corporate plaintiff completely precludes the operation of the store on the Jewish Sabbath since that would be doing business vicariously and causing others to work on the Sabbath. The large majority of Crown Market's customers, who share these beliefs, may not shop nor cook on the Sabbath. Preparation for meals during the 24 hours of the Jewish Sabbath, and especially the traditional family feast on Friday night, consumes most of the daylight hours on Friday.

Crown Market is not open for business between sun-down on Friday and sun-down on Saturday, and on 13 Jewish holidays each year. The Crown Market is open for business from 8:00 A.M. to 6:00 P.M. every Sunday and has been open every Sunday (excluding Jewish holidays) since it was established August 18, 1953. More than one-third of its gross sales each week are made on Sunday.

Two of the three named customer plaintiffs are residents of Springfield, and the third is a resident of Turners Falls, 43 miles to the north. All are Orthodox Jews who are regular customers of the corporate plaintiff's store. These three customers represent a class of Orthodox Jewish people of the area served by the corporate plaintiff's store, who seek to enforce their civil rights by obtaining a common relief.

The named plaintiff rabbi is the Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and is the president of the Massachusetts Council of Rabbis. He has been duly authorized by the latter organization to represent it in this case. Besides his religious duties

as leader and teacher of his congregation, the plaintiff rabbi has the duty (which he discharges through an inspector) of inspecting kosher meats and butcher shops daily except on the Jewish Sabbath to insure compliance with Jewish dietary laws. The inspector comes to the Crown Market at 8:00 A.M. on Sunday for the washing of any meat which is on hand from animals slaughtered on the previous Thursday. Among the dietary rules enforced is that fresh meat must be rewashed every 72 hours, that only meats and seafoods of certain kind and quality may be eaten, and that meat and dairy products must not be commingled, even by the use of the same implements for both. The plaintiff rabbi represents a class, which seeks to enforce its common rights by a common relief.

The defendant, who is the Chief of Police of Springfield, Massachusetts, threatens to enforce the Lord's Day Act to the full extent of his authority by instituting criminal prosecutions against the corporate plaintiff, its officers, stockholders, directors and employees, for each violation, that is, for each Sunday on which Crown Market is open for business.

The manager of the Crown Market, president of the corporation and a stockholder, was convicted of violating the Lord's Day Act in the Massachusetts state court. His exceptions in that trial, which questioned the constitutionality of that law under the state constitution but raised no Federal constitutional issue, were overruled by the Supreme Judicial Court. *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957).

Judge William T. McCarthy, who dissented below, disagreed with the majority as to the facts in this case,

citing the agreed upon facts in *Commonwealth* v. *Chernock, supra.* A comparison of the facts as set forth by the Court below with the agreed upon facts in *Chernock,* we respectfully submit, reveals no substantial disagreement, and certainly no factual differences which can possibly affect the constitutional issues.

The statutory Federal District Court for the District of Massachusetts gave judgment for the plaintiffs. It held the Massachusetts Lord's Day Act unconstitutional under the First and Fourteenth Amendments. One judge dissented. The opinions appear at 176 F. Supp. 466 (1959).

The Question Presented

This case presents this Court with the question whether a state law, such as the Massachusetts Lord's Day Act, barring labor, business or work on Sundays, violates those clauses of the First Amendment prohibiting an establishment of religion and guaranteeing its free exercise, and violates the equal protection clause of the Fourteenth Amendment.

Summary of Argument

This Court, while it has discussed Sunday laws in several cases, has never decided the constitutional issues raised herein. The religious origin of Sunday laws is undisputed. That their religious purpose continues is demonstrated by an examination of their language, by the nature of the exceptions and by an analysis of the legal precedents upon which recent decisions upholding their constitutionality are based. Therefore, such laws are an establishment of the religion of those sects which observe Sunday as their holy day, in violation of the First Amendment, as the same has been held applicable to the states by the Fourteenth Amendment.

Sunday laws violate the religious freedom of Jews, Seventh Day Adventists, Seventh Day Baptists and all others who do not observe Sunday as their holy day. These laws require religious non-conformists to manifest a pattern of conduct inconsistent with their own religious commitment and consistent only with the religious beliefs of the majority. By prohibiting business and shopping on Sunday, such statutes impose an economic penalty upon those who observe Saturday as their Sabbath.

Independent of any consideration under the First Amendment, Sunday laws which do not completely exempt from their strictures those who observe another day of the week as their Sabbath, deny them equal protection of the laws.

ARGUMENT

I—Laws barring labor, business or work on Sundays violate the First Amendment's prohibition against an establishment of religion.

A. The "Establishment of Religion" Clause of the First Amendment

The First Amendment to the United States Constitution provides, in part, as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *

This provision against action by Congress has been held equally applicable to action by the states or any of their political subdivisions. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

The "establishment of religion" clause has been defined by this Court in three recent decisions: *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) and *Zorach* v. *Clauson*, 343 U. S. 306 (1952). There was no disagreement between the majority and minority opinions in *Everson* on the following definition:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain

> away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State" 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

In *McCollum* this definition of the establishment clause was the basis for a determination that a released time program in the public schools of Champaign, Illinois violated the First Amendment. Under that program, children attending public schools were released one hour during each week to receive religious instruction within the school buildings from teachers provided and paid by religious groups. In an eight to one decision, this Court struck down that system quoting with approval the definition of establishment from the *Everson* case 333 U. S. at 210-211.

This Court's interpretation of the meaning of "establishment of religion" was in no way weakened or modified by its subsequent decision in *Zorach* v. *Clauson*, *supra*, upholding the New York released time program. In that case, this Court distinguished the facts from those in the *McCollum* case, since the New York program did not involve use of public school buildings for religious instruction.

The Court expressly re-affirmed the principle enunciated in *Everson* and *McCollum*—"We follow the *McCollum* case." 343 U. S. at 315.

There was agreement among the members of this Court in defining the "establishment of religion" clause in *Everson, McCollum* and *Zorach* that, whatever else it means, it certainly prohibits the state or any of its political subdivisions from singling out one or a few religions for special assistance or from giving some religions preferential treatment over others.

B. The Religious Origin of Sunday Laws

An examination of the origin of Sunday laws establishes that their function is to compel observance of the Christian holy day. Both the majority and minority opinions below acknowledge that the Massachusetts statute originally had religious motivation and purpose. 176 F. Supp. 466 (1959). The statute of 1653 was intended "to compel a seemly observance" of the Sabbath celebrated by the dominant Christian sect. at 472. The preamble to the early forms of the statute made its religious intent obvious. at 480.

The Supreme Court of New Jersey described Sunday legislation as "the product of Church-State unions. The American colonists brought with them the tradition of a state-established religion * * * and perhaps solely for sectarian reasons the authority of colonial government was exerted to support the Christian Sabbath." *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 205 (1960).

The New York Court of Appeals also recognized that Sunday laws "may be said to have had a religious origin." *People* v. *Friedman* 302 N. Y. 75, 79 (1950).

The Superior Court of Pennsylvania, in *Commonwealth* v. *Hoover,* 25 Pa. Super. Ct. 133, (1904), in tracing the origin and development of Sunday laws, said:

> Sunday legislation is more than fifteen centuries old, and the "historic argument" is of value in construing existing law. "All Sunday legislation is the product of Pagan Rome; the Saxon laws were the product of Middle Age legislation of 'The Holy Roman Empire.' The English laws are the expansion of the Saxon, and the American are the transcript of the English." The first Sunday law, the edict of the Emperor Constantine, was the product of that pagan conception developed by the Romans which made religion a part of the state. The day was to be venerated as a religious duty owed to the God of the Sun. During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish Theocracy. The English Reformation introduced, for the first time, the doctrine of the Fourth Commandment to the first day of the week. at 134.

The highest court of Massachusetts described Sunday statutes in the same way:

> Our Puritan ancestors intended that the day [Sunday] should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares of amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial

modification, to the present time. *Davis* v. *Somerville,* 128 Mass. 594, 596 (1880).[2]

Sunday was adopted by Christians as the holy day in lieu of Saturday. This was done centuries after Christ in commemoration of the Resurrection. *Rodman* v. *Robinson,* 134 N. C. 503, 510 (1904); 21 ENCYCLOPEDIA BRITANNICA 565 (1959 ed.) Thus, Sunday laws were enacted to lend the authority of the state to require compliance with the observance of the Sabbath of those religious sects for whom Sunday is a holy day. The authority of the state was in no way put behind the observance of the Sabbath of those religious groups which regard some day other than Sunday as their holy day.

The sectarian origin and character of Sunday laws was recognized by this Court in *Richardson* v. *Goddard,* 64 U. S. (23 How.) 28 (1860). "The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by Emperor Constantine as a civil regulation, in conformity with the practice of the Christian church." at 41.

C. The Current Religious Purpose of Sunday Laws

An examination of the Sunday laws currently on the statute books of the various states shows beyond doubt that the original motivation and intent of such legislation still continues. The very title of Chapter 136 of the Laws of Massachusetts, "Observance of the Lord's Day," and the frequent reference to "the Lord's Day" in the

2. See also, *Commonwealth* v. *McCarthy,* 244 Mass. 484, 486 (1923) and notes on Sunday Laws in 35 So. Cal. L. Rev. 131 (1951), 3 St. Louis U. L. J. 300 (1955).

body of the chapter demonstrates the religious nature of the present act. The phrase used to spell out an exception for "works of necessity and charity" (Sec. 5) is derived verbatim from 29 *Car* II, Ch. 7 (1676), the first English Sunday closing law, the religious motivation of which is beyond question. Even the exception set forth in Sec. 6 of the Massachusetts statute for a person who "conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day," is meaningful only as an exception to a prohibition sectarian in nature. Also, the statute contains a specific ban in Sec. 2 on presence at games, sports, play or public diversions "except a concert of sacred music." Other exceptions are made in Sec. 2 for "celebration of a religious custom or ritual" and in Sec. 10 for parades "for the purpose of attending divine service." Here again, the exceptions clearly demonstrate that the purpose of the statute is religious. Note also the use of the term "secular business" in Sections 5 and 12.

Massachusetts is not alone in using religious terms to set forth its Sunday prohibitions. Practically all the states having such legislation on their books use terms such as : "Lord's Day"[3], "Desecration"[4], "Religious Uses"[5] or "Religious Holidays."[6] Also, the exception,

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3. *Ga.* Code Anno., sec. 26-6905; *Maine* Rev. Stats., ch. 134, sec. 38; *Md.* Code Anno., Art. 27, sec. 492; *N. H.* Rev. Stats., Anno., sec. 578:3; Purdon's *Pa.* Stats., Anno., Tit. 18, secs. 632, 4699.4; *S. C.* Code, secs. 64-1, 64-2.

4. *Kan.* Gen. Stats., Anno., sec. 13-430; *Neb.* Rev. Stats., sec. 28-940; Purdon's *Pa.* Stats., Anno., Tit. 18, sec. 4699.4.

5. *N. D.* Rev. Code (1943), sec. 12-2115; *Okla.* Stats., Anno., Tit. 21, sec. 907; *S. D.* Code (1939), Tit. 13, sec. 1709.

6. *Ga.* Code Anno., sec. 14-1810.

total or partial, for persons observing some other day as their Sabbath is found in many other statutes.[7]

A telling example of the unchanged religious nature of a Sunday closing law is provided by the laws of Maryland, where the statute enacted in 1723, using religious terms such as "Lord's Day," "profane", and "works of necessity and charity," has remained virtually unchanged to the present day. Anno. Code of Maryland, 1957, Art. 27, Sec. 492.

The language of many court decisions acknowledges the continuing religious purpose of Sunday laws. *Davis* v. *Somerville, supra.* In a recent decision, the Supreme Court of New Jersey stated that that state's Act of 1951, prohibiting worldly employment or business, except works of necessity and charity, on the Christian Sabbath, "strongly suggests orientation to a sectarian desire to protect the Sabbath, as such, against 'desecration.'" *Two Guys from Harrison, Inc.* v. *Furman, supra,* at 217.

The highest court of Georgia described that state's Sunday law in the following terms: "The law fixes the day recognized as the Sabbath Day all over Christendom, and that Day, by divine injunction, is to be kept holy—'on

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7. *Ark.* Stats., Anno., sec. 41-3806; *Conn.* Gen. Stats., (Rev. 1958), ch. 946, sec. 53-303; Smith-Hurd *Ill.* Stats., Anno., ch. 38, sec. 549; Burns *Ind.* Stats., Anno., ch. 43, sec. 10-4301; *Iowa* Code Anno., ch. 729, sec. 729.1; *Kan.* Gen. Stats., Anno., sec. 69-101; *Ky.* Rev. Stats., Anno., sec. 436.160; *Maine* Rev. Stats., ch. 134, sec. 44; *Mich.* Stats., Anno., sec. 18.122; *Minn.* Stats., Anno., ch. 614, sec. 614.30; Vernon's *Mo.* Stats., Anno., sec. 563.700; *Neb.* Rev. Stats., sec. 28.940; McKinney's *N. Y.* Penal Law, sec. 2144; *N. D.* Rev. Code, sec. 12-2117; Page's *Ohio* Rev. Gen. Code Anno., sec. 3773.24; *Okla.* Stats., Anno., Tit. 21, sec. 909; *R. I.* Gen. Laws, sec. 11-40-4; *S. D.* Code (1939), Tit. 13, sec. 1710; Vernon's *Texas* Penal Code Anno., Art. 284; *Va.* Code, sec. 18.1-359; *Wash.* Rev. Code, sec. 9.76.020; *W. Va.* Code (1955), sec. 6073.

it thou shalt do no work.'" *Karwisch* v. *Mayor and Council of Atlanta*, 44 Ga. 204, 208 (1871).

In *Brimhall* v. *Van Campen*, 8 Minn. 1 (date not given) in voiding a note executed on Sunday, the Supreme Court of Minnesota said: "This Sunday act can have no other object than the enforcement of the fourth of God's commandments." at 5.

The Supreme Court of Iowa characterized Sunday as "established by laws, both human and divine, for public worship and private devotion * * * that time-honored and heaven appointed institution." *Davis* v. *Fish*, 1 Greene's Rep. 406, 412 (1848).

The Supreme Court of Alabama described that state's Sunday law in the following terms: "We do not think the design of the legislature in the passage of the act can be doubted. It was evidently to promote morality and advance the interest of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday * * *." *O'Donnell* v. *Sweeney*, 5 Ala. 467, 469 (1843).

The Supreme Court of Maryland, in analyzing and commenting upon different Sunday laws in different states, said: "* * * while they may differ in their phraseology and the penalties imposed, they are substantially the same in their general scope and provision:—all looking to keeping the day sacred, and as one of rest from secular employment * * *" *Philadelphia, Wilmington and Baltimore R. R.* v. *Lehman*, 56 Md. 209, 227 (1881).

From all that has been said above, it follows that Sunday laws violate that section of the First Amendment which prohibits both the states and the Federal Government from enacting any laws "which aid one religion, aid all religions or prefer one religion over another," from "particip[ing] in the affairs of any religious organizations or groups," *Everson* v. *Board of Education, supra, McCollum* v. *Board of Education, supra,* or which "coerce anyone to attend church [or] to observe a religious holiday" *Zorach* v. *Clauson, supra,* at 314, or which fail to maintain neutrality in the competition between religious sects, *ibid.*

D. The Nature and Significance of the Exceptions to the Sunday Laws

When this Court held that the First Amendment was a limitation upon the states as well as upon the Congress, *Cantwell* v. *Connecticut, supra,* Sunday laws could no longer be sustained if their true character, as laws in aid of religion, were acknowledged. The courts of many states thenceforth sustained Sunday laws by asserting or rationalizing that they were predicated upon the power of the state to protect the public health and welfare by mandating a day of rest. *People* v. *Friedman, supra,* app. dismissed 341 U. S. 907 (1951); *McGowan* v. *Maryland,* 220 Md. 117 (1959); *Commonwealth* v. *Chernock,* 336 Mass. 384 (1957); *City of Harlan* v. *Scott,* 290 Ky. 585 (1942); 3 St. Louis U. L. J. 300 (1955).

If the true purpose of Sunday legislation were to provide for a day of rest in the interest of public health and welfare, rather than to enforce religious observance of the Christian Sabbath, how do the legislatures countenance the "disintegrating erosion of particular exceptions?"[8]

8. Cardozo, C. J., in *Meinhard* v. *Salmon,* 249 N. Y. 458, 464 (1928).

To carry out a welfare purpose, it would appear that the legislatures would, if rest were the purpose of the statutes, tolerate fewer exceptions rather than grant more, as is actually the case, state by state.

For example, under the law of Massachusetts (Ch. 136), the following activities are or may be exempt from the general ban on Sunday work and labor. exhibition of motion pictures after 1:00 P.M. (Sec. 4); operation after 1:00 P.M. of shooting galleries, bowling alleys and photographic studios (Secs. 4A, 4B); the retail sale of tobacco, bread (before 10:00 A.M. and between 4:00 P.M. and 6:30 P.M.), frozen desserts and/or ice cream mixes, soda water and confectionery; the operation of motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the preparation, printing, publication, sale and delivery of newspapers; the making of butter and cheese; the keeping open of public bath houses; the operation of a shoe shining parlor (before 11:00 A.M.); the digging of clams; the icing and dressing of fish; unpaid work in or about private gardens or private grounds adjacent to a dwelling house; the sale of catalogs of pictures and other works of art in certain types of exhibitions, (Sec. 6); and parades held by certain groups (Secs. 10 and 11).

The corresponding laws of other states are punctured by similar exceptions. As to New York, see McKinney's Penal Law, Secs. 2147, 2151, 2152, 2154. As to Connecticut, see Gen. Stats. (1958 Rev.) Secs. 53-300, 53-302. As to Minnesota, see Stats., Anno., Secs. 340.021, 614.29. As to New Hampshire, see Rev. Stats., Anno., (1955) Secs.

578.3, 578.4, 578.5. As to Pennsylvania, see Purdon's Stats., Anno., Tit. 4, Secs., 60, 82, 121, 122, 152, 156, 182; Tit. 18, Sec. 4699.4; Tit. 47, Sec. 4-406.

The fact that many state Sunday laws prohibit certain activities, such as baseball and football games and other athletic contests before 1:00 P.M. or 2:00 P.M. on Sundays cannot be explained logically if such statutes are intended solely as health and welfare measures under the police power to insure a day of rest. On the other hand, such prohibitions are fully consistent with the purpose of discouraging activities which might compete with church attendance at morning services. In Charlotte, North Carolina where church services are customarily held between 6:30 P.M. and 9:00 P.M. on Sundays, a municipal ordinance prohibits the operation of drive-in theatres during those hours. See *McGee* v. *North Carolina*, 237 N. C. 633 app. dismissed, 346 U. S. 802 (1953).

E. Religious Basis for Recent Rulings

A number of state court decisions, upholding the constitutionality of Sunday laws on the asserted ground that they serve public health and welfare, rely on old decisions which, in upholding their constitutionality, nevertheless reveal an acknowledgment of their basic religious character.

The decision of the New York Court of Appeals in *People* v. *Friedman*, *supra*, provides an excellent illustration for this misuse of old precedents. This is the case which is frequently cited by those who claim that Sunday laws are motivated by secular considerations. It was on this case that Judge McCarthy, the dissenter below, relied in holding that the Massachusetts Sunday law, al-

though religious in origin, through a curious metamorphosis of statutory interpretations, has become a civil regulation.

In the *Friedman* case, the New York Court of Appeals ruled that the "power of the Legislature to regulate the observance of Sunday as a civil and political institution is well settled." at 80. In addition to citing three U. S. Supreme Court decisions (which will be discussed below), the opinion relies on two decisions of the New York Court of Appeals: *People* v. *Moses*, 140 N. Y. 214 (1893) and *People* v. *Havnor*, 149 N. Y. 195 (1896).

In *People* v. *Moses*, the Court stated: "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned." at 215 The *Moses* opinion then cites the following two decisions of the same Court: *Lindenmuller* v. *People*, 33 Barb. 548 (1861) and *Neuendorff* v. *Duryea*, 69 N. Y. 557 (1877). The opinion in *Neuendorff* v. *Duryea* relies on *Lindenmuller*.

The other decision cited by the New York Court of Appeals in the *Friedman* case, *People* v. *Havnor*, is predicated upon the decision in *Lindenmuller* which it terms the "leading case in our state upon the subject," as well as upon the *Neuendorff* and *Moses* cases.

It is clear, therefore, that the ultimate precedent for the *Friedman* decision was the *Lindenmuller* case. Let us, now examine that case.

The defendant in the *Lindenmuller* case was indicted for giving theatrical exhibitions on Sunday in violation of 2 R. S. 675, Sec. 70, which characterized "the first day of the week as holy time." He pleaded not guilty, was tried and convicted. The conviction was affirmed on appeal. The text of the opinion is worthy of examination.

The Court opened by asserting that Christianity was part of the common law of the State of New York "to the extent that entitles the Christian religion and its ordinances to respect and protection, as the acknowledged religion of the people." at 560. In discussing the extent to which English common law has been received in New York, the Court rejected the contention that the constitutional guarantee of the free exercise and enjoyment of religious profession and worship is inconsistent with and repugnant to "the recognition of Christianity, as the religion of the people entitled to, and within the protection of, the law." at 561. The Court went on to say that "Christianity may be conceded to be the established religion, to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession." at 562.

The Court asserted: "The public peace and public welfare are greatly dependent upon the protection of the religion of the country, and the preventing or punishing of offenses against it, and acts wantonly committed subversive of it." at 564-5.[9]

9. But cf. *Burstyn* v. *Wilson*, 343 U. S. 495 (1952) where this Court stated that "the state has no legitimate interest in protecting any or all religions from views distasteful to them * * * It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine." at 505.

Speaking for a unanimous Court, Mr. Justice Allen cited *People* v. *Ruggles*, 8 Johns. 290 (1811), for the principle "that blasphemy against God, and contumelious reproaches and profanity of Christ or the holy scriptures, were offenses punishable at the common law in this state as public offenses." at 565.

The language in Chief Justice Kent's opinion in the *Ruggles* case is paraphrased by Mr. Justice Allen when he points out that "the Constitution does not secure the same regard to the religion of Mahomet or the grand lama as to that of our Saviour, for the plain reason that we are a christian people." at 566. Further, using the same case as his authority, Allen asserted the right of the civil courts and of the legislature to accept the Christian religion "as the religion of the people, as distinguished from the false religions of the world." at 566.

Lindenmuller thus accepts "the christian sabbath, as one of the institutions" of the Christian religion which "may be protected from desecration by such laws as the legislature * * * may deem necessary to secure to the community the privilege of undisturbed worship, and the day itself that outward respect and observance which may be deemed essential to the peace and good order of society, and to preserve religion and its ordinances from open reviling and contempt—and this not as a duty to God, but as a duty to society and to the state." at 567-8.

Finally, the Court reasoned that the Legislature has the right to decree that one day in seven shall be set aside for relaxation and refreshment, and the selection of such day, as a civil institution, is at the option of the Legislature —"but for a christian people, it is highly fit and proper that the day observed should be that which is regarded as

the christian sabbath, and it does not detract from the moral or legal sanction of the law of the state that it conforms to the law of God, as that law is recognized by the great majority of the people."[10] at 569.

Thus, when the highest Court of New York relied upon *Lindenmuller* in its later decisions, including the *Friedman* case, as establishing the proposition that the New York Sunday Law was simply a civil regulation, it disregarded the plain language of the *Lindenmuller* opinion and the basic assumptions upon which that opinion rests. These assumptions are: 1) that Christianity, as part of the common law of England, a country with an established church, was received into the common law of New York; 2) that Christianity is the established religion of the people and, therefore, entitled to special protection; 3) that other religions—characterized as "false religions of the world" —are entitled merely to toleration; and 4) that it is a proper function of the Legislature to protect the Christian Sabbath, as one of the institutions of the dominant religion, from desecration.

Each of these assumptions is inconsistent with the First Amendment as interpreted by this Court in *Everson*, *McCollum*, *Zorach* and *Burstyn* and made applicable to the states by *Cantwell* and *Murdock*.

One of the cases now under consideration by this Court involving the constitutionality of a state Sunday law arises

10. The fact that a statute respecting an establishment of religion favors the religion of the majority, of course, cannot save it from constitutional invalidity. "The 'protection' [of religious freedom] means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong, the few against the many." *Board of Education* v. *Minor*, 23 Ohio St. 211, 251 (1872).

in Maryland—*McGowan* v. *Maryland*, 220 Md. 117. An examination of the decision of that State's Court of Appeals upholding the Maryland statute reveals a remarkable parallel with *Friedman* in New York. The Maryland Court stated that it had often ruled, as had other courts, that "the basic purpose of such statutes, with their exceptions, is the civil establishment and regulation of a day of rest from work, not a law respecting the establishment of religion or prohibiting the free exercise thereof, and that the statutes do not offend the First and Fourteenth Amendments to the Constitution of the United States." at 122, 123. Three authorities are cited—two Maryland cases and one New York case. The New York case is *People* v. *Friedman, supra*, which, as has been shown, is based on *Lindenmuller*. The two Maryland cases are: *Judefind* v. *State*, 78 Md. 510 (1894) and *Levering* v. *Board of Park Commissioners*, 134 Md. 48 (1919).

Judefind, a Seventh Day Adventist, was arrested, convicted and sentenced for husking corn on Sunday in violation of Maryland's Sunday law. After he had served 30 days in prison, the Maryland Court of Appeals affirmed the conviction. In upholding the state's Sunday law, it relied upon three earlier decisions of the same Court. *Kilgour* v. *Miles*, 6 Gill & J. 268 (1834); *State* v. *Fearson*, 2 Md. 310 (1852); *Philadelphia, Wilmington and Baltimore R.R.* v. *Lehman*, 56 Md. 209 (1881).

In *Kilgour*, the Court of Appeals stated: "'Ours is a christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the 24 hours next ensuing the midnight of Saturday.'" at 274.

In *Fearson*, the Court, speaking of a violation of the Sunday law, said that "* * * this is a gross offense against decency and public morals, and therefore richly merits punishment." at 313.

In *Philadelphia, Wilmington and Baltimore R.R.*, the Court, speaking of the Sunday laws of the various states, said as mentioned above, [11] that " they are substantially the same in their general scope and provision; * * * all looking to keeping the day sacred and as one of rest from secular employment. * * *" at 227.

The second case cited in *McGowan* is *Levering* v. *Board of Park Commissioners, supra,* in which the Maryland Court of Appeals declared void as violating the state Sunday law, a Baltimore ordinance permitting professional baseball and other games on Sundays. This decision, in upholding Sunday legislation, relies on *State* v. *Fearson* and *Judefind* v. *State,* discussed above, and on *Petit* v. *Minnesota,* 177 U. S. 164 (1900) which will be discussed below.[12]

Here again, the basic assumptions found in the decisions on which *McGowan* is predicated, are in clear conflict with the First Amendment.

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11. See p. 15, *supra.*

12. A third case relied upon is *Barnie's* case, an unreported decision of a lower Maryland Court.

F. Prior Decisions of This Court Discussing Sunday Laws

This Court has never squarely decided the issue raised in this case.

This Court has discussed Sunday laws in three decisions. The first is *Soon Hing* v. *Chief of Police*, 113 U. S. 703, decided in 1885. This case involved the validity of an ordinance adopted by the city of San Francisco, which prohibited any person owning or employed in a public laundry from washing or ironing clothes between the hours of ten in the evening and six in the morning or on Sunday. The appellant, Soon Hing, was found guilty of violating the ordinance by washing and ironing clothes in a public laundry during the prohibited hours on a week day. He thereupon attacked the ordinance as unconstitutional on the ground that it deprived him of his right to labor at all times. Mr. Justice Field, speaking for the Court, upheld the ordinance as applied in that case, noting that the prohibition against labor on Sunday was not involved. Therefore, *Soon Hing* was not a ruling by this Court on the validity of Sunday laws.

However, in dealing with the attack on the ordinance because it deprived the appellant of the right to work at all times, Mr. Justice Field pointed out that such regulations of working hours were constant subjects of legislation and were valid in his view. It was in this context that he said, in what is clearly dictum, that laws setting aside Sunday as a day of rest were upheld by the highest courts of the state "not from any right of the Government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from unin-

terrupted labor." at 710. He commented that such laws "have always been deemed beneficent and merciful laws, especially to the poor and dependent, to laborers in our factories and workshops and in the heated rooms of our cities; * * *" *ibid.*

The Court's attitude was understandable, considering the year of the decision. In those days, there were few laws protecting labor. The seven-day work week and the sun-up to sun-down work day were all too commonplace. Aside from the fact that *Soon Hing* did not decide the validity of Sunday laws, it is doubtful whether this Court would rule the same way if faced with the case today especially in view of the fact that the ordinance attacked was one of many discriminatory measures then aimed at Chinese. See *Gandolfo* v. *Hartman*, 49 F. 181 (1892); CROSS, A HISTORY OF THE LABOR MOVEMENT IN CALIFORNIA, 81-83, 124 (1935).

The second case in which this Court discussed Sunday laws was *Hennington* v. *Georgia*, 163 U. S. 299 (1896). In that case, the superintendent of the Alabama Great Southern Railroad Company was indicted for having operated a freight train on the Sabbath in violation of a Georgia statute. The defendant argued that the statute, as applied in his case, conflicted with Congress' exclusive power to regulate commerce among the states. This contention was overruled and the jury found the defendant guilty as charged. The Supreme Court of Georgia upheld the statute as a valid police regulation, and this Court reviewed that judgment exclusively on the basis of the defendant's claim that the statute conflicted with the Commerce Clause of the Federal Constitution. Hence, the constitutionality of Sunday laws under the First Amendment was not then before the Court.

It is true that in the course of the opinion, the Court said that laws enacted to protect the public health and safety are valid unless they had "no real or substantial relation" to public health or safety or were "a palpable invasion of rights secured by the fundamental law." It was in this connection that the Court expressed the opinion that the Sunday law in question was enacted "to prescribe a rule of civil duty for all who, on the Sabbath Day, are within the territorial jurisdiction of the state." The Court also said, "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty." at 304. The Court concluded its discussion of this point with the following:

> The Legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation "was of admirable service to a state, considered merely as a civil institution." 4 Bl. Com. 63.

The authority of Blackstone, cited by the Court for the proposition that Sunday laws are a civil regulation, loses its persuasiveness when the cited passage is read in its full context:

> IX. *PROFANATION OF THE LORD'S DAY*, vulgarly (but improperly) called *Sabbath breaking*, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for

> public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker.

It should also be noted that the foregoing language appears in BLACKSTONE's COMMENTARIES in Book IV, Chapter 4, entitled "Of Offences Against God and Religion."

With reference to the Court's reliance on the "fundamental law," it should be noted that the opinion does not indicate which provision of the "fundamental law" (other than the Commerce Clause) was the basis for its consideration of the validity of Sunday law. In any event, the discussion of the constitutionality of Sunday laws was dictum.

The fact that the constitutionality of the statute under the Commerce Clause was the sole issue before this Court in the *Hennington* case is also demonstrated by Chief Justice Fuller's dissenting opinion.

> "This statute in requiring the suspension of interstate commerce for one day in the week amounts to a regulation of that commerce and is invalid because the power of Congress in that regard is exclusive. But it is said that the act is not a regulation of com-

> merce but a mere regulation of police, and that the so-called police power of a state is plenary. The result, however, is the same. When a power of a state and a power of the general government come into collision, the former must give way; and as the freedom of interstate commerce is secured by the Constitution, except as Congress shall limit it, the act is void because of the violation of that freedom." at 318-19.

Note that the dissenting opinion makes no mention of the fact that the day of the week on which the running of the freight train was prohibited was Sunday!

In any event, it is doubtful whether this Court would today uphold a state law prohibiting the operation of freight carriers on Sundays.

The third case, *Petit* v. *Minnesota*, 177 U. S. 164 (1900), arose when a barber was convicted of keeping his shop open on Sunday in violation of a Minnesota statute. This statute prohibited all labor on Sunday, excepting work of necessity or charity, and adding a provision that keeping open a barber shop on Sunday was not to be deemed a work of necessity or charity. The appellant attacked the statute on the ground that it was class legislation directed against barbers, and that it deprived him of property without due process of law by prohibiting his business activities on Sunday unlike other trades or occupations.

Chief Justice Fuller, in delivering the opinion of the Court, cited *Hennington* as authority for the statement that the legislature has the power to enact laws prohibiting work and labor on Sunday, for which we have already shown *Hennington* is not a precedent. The opinion then dealt exclusively with the actual issue of the case, namely

whether the statute contained an unreasonable discrimination and, therefore, violated the Fourteenth Amendment.

Finally, it should be noted that all three of these cases were decided by this Court before the First Amendment was held applicable to the states through the Fourteenth Amendment. Hence, in these three cases the Court had no occasion to consider the issue presented by the case at bar, which is whether state laws prohibiting Sunday activities constitute an establishment of religion or a prohibition of the free exercise thereof, in violation of the First Amendment to the Constitution.

In 1951 this Court had an opportunity to consider this question in *Friedman* v. *People of the State of New York*, when an appeal was taken from a New York Court of Appeals decision upholding the validity of a Sunday law against an attack predicated upon the First Amendment. *People* v. *Friedman*, 302 N. Y. 75 (1950). This Court dismissed the appeal without opinion "for the want of a substantial federal question." 341 U. S. 907.[13]

II—Laws barring labor, business or work on Sundays violate the First Amendment's guarantee of freedom of religion.

A. Aid to Majority Religions an Impairment of Religious Freedom

The purpose of both the "establishment" and "free exercise" clauses of the First Amendment is to assure religious freedom. This Court in *Everson* characterized these two clauses as "complementary" and reaffirmed their

13. But see pages 19-22, *supra*, for discussion of the cases relied on by the Court of Appeals in the *Friedman* case.

interrelationship. 330 U. S. at 15. The objective of the First Amendment was there declared to be to secure "religious liberty from the invasion of the civil authority." *ibid.*

Thus, the First Amendment places religious beliefs, observance and worship completely beyond the competence of the Federal Government. This was not done as an expression of hostility to religion; but upon the "premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education, supra,* at 212. As Mr. Justice Frankfurter wrote in his concurring opinion in *McCollum, supra,* (at 232): "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion," citing *Everson v. Board of Education,* 330 U. S. at 59.

The "liberty" guaranteed to every person by the Fourteenth Amendment against deprivation without due process of law, places the state governments in the same position as the federal Government with respect to their incompetence to legislate on religious beliefs, observance or worship. *Cantwell* v. *Connecticut, supra; Murdock v. Pennsylvania, supra; McCollum* v. *Board of Education, supra.*

When the state aids and supports specific religious denominations by selecting their day of worship as the day for general observance, the status and dignity of the other religions are thereby impaired.

Adherents of minority religious groups, and particularly their children, are constrained in the free and open practice of their religious rites when the state places its

stamp of approval upon the religious practices and customs of the religious group which happens to be in the majority. Thus, an inferior status is imposed by the state upon some religions, and the First Amendment's guarantee of religious freedom is violated.

This concept of inferior status for some religions has unfortunately found support from dicta in court decisions, such as the statement by Mr. Justice Brewer in *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457, 472 (1892) "* * * this is a Christian nation." At this date, it requires no argument to establish that any such concept is wholly irreconciliable with the language and the spirit of the First Amendment and the basic political philosophy upon which our government was founded. Yet such erroneous concepts are nurtured by state enactments, like Sunday laws, which place the momentum of the civil authority behind one of the institutions of Christianity.

B. Imposed Conformity with Sectarian Conduct

Sunday laws do not prohibit work on the original Biblical Sabbath, the seventh day of the week, but on Sunday the first day of the week. This substitution of the first day for the seventh day as the holy day took place in the early centuries of Christianity. Sunday, the first day in the week, is called the Lord's day because it commemorates the resurrection of Jesus, a religious event of deep significance to Christians, but of no religious meaning to the Jewish and other non-Christian religions. 21 ENCYCLOPEDIA BRITANNICA 565, 19 ENCYCLOPEDIA BRITANNICA 787 (1959 ed.).

The effect of Sunday laws is to compel those who do not believe in the divinity of Jesus or the Resurrection,

outwardly to conduct themselves as though they do. Refraining from work and from many forms of recreation, under sanction of a civil ordinance, is a compulsory symbol of respect comparable to kneeling, crossing one's self or uncovering the head as in Christian forms of worship.

State imposed restrictions on work, business or labor on Sundays is offensive to Jews, Seventh Day Adventists, Seventh Day Baptists and to adherents of other non-Christian religions. As Mr. Justice Jackson stated eloquently in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

C. Sunday Laws and Economic Coercion

When the state imposes restrictions upon work or labor that may be performed on Sunday, it not only provides special protection for the Christian sects which celebrate Sunday as their holy day, but it also places an economic penalty upon Jews and upon those Christian denominations that observe Saturday as the Sabbath, to the prejudice of the latter groups. By denying to such minority religious groups the liberty to work, shop or labor on Sunday, the law clearly deprives them of the productive use of one day which is available for such use to the majority religious groups. In other words, where a retail establishment belonging to a Christian may be open for

business six days a week, a similar establishment belonging to a competitor who observes the Jewish Sabbath can be open only five days a week. *Johns* v. *State*, 78 Ind. 332 (1881).

In addition, this case highlights the plight not only of the Jewish merchant but also of his Jewish patron who works for a living during the customary five weekdays, worships on his Sabbath and is barred by the Massachusetts Lord's Day Act from shopping on the only day available to him for that purpose. The five-day work week is becoming increasingly widespread in our industrial economy. One of the principal advantages of this arrangement of the work week is that it allows the worker to spend one full day of the weekend for his shopping and attending to his personal affairs. Saturday has become the main shopping day of the entire week. Orthodox Jews cannot shop on Saturday. The state by enacting Sunday laws, prevents them from doing their shopping on the only day of the weekend which would be available to them for that purpose. Nor is this a hypothetical situation. The facts in this case clearly establish that a real hardship is being imposed upon the Orthodox Jewish customers of the corporate plaintiff.

III—Laws barring labor, business or work on Sundays violate the Fourteenth Amendment's guarantee of equal protection of the laws unless they exempt those who observe a different day as their holy day.

The Fourteenth Amendment provides in Section 1 that:

> No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.

This provision clearly prohibits the state and all its political subdivisions from discriminating against any person or group of persons because of their religious conviction or affiliation. This was affirmed by this Court in *Niemotko* v. *Maryland*, 340 U. S. 268 (1951), where Jehovah Witnesses were denied protection equal to that provided for the dominant religions. That was discrimination barred by the First and Fourteenth Amendments. *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). In *Fowler* this Court condemned state action which discriminated against a small, unpopular religious sect with respect to the use of a public park for meeting purposes.

It has been shown above in the discussion of the "establishment" clause of the First Amendment, that Sunday legislation amounts to state endorsement of the holy day of certain Christian denominations and thus preference for such Christian denominations over other religious sects which observe some other day as their holy day. By the same token, Sunday legislation violates the "equal protection" clause of the Fourteenth Amendment since the state, by preferring the holy day of one religion, necessarily discriminates against all others.

Also, as has been shown above, Sunday laws impair the freedom of religion of those who do not commemorate the resurrection of Jesus, by compelling them to conduct themselves on Sundays as if they did. Furthermore, it has been shown that these laws place observant Jews, both businessmen and customers, at an economic disadvantage.

All these arguments compel the conclusion that Sunday laws discriminate against Jews and others who do not observe the Christian holy day, and thus deny them the equal protection of the laws required by the Fourteenth Amendment.

The discriminatory aspect of Sunday legislation has been recognized by those states which provide an exception for persons who observe some other day as their Sabbath and refrain from work or labor on such day.[14] Clearly, any state Sunday law must provide an exception as broad as the prohibition for those who observe a different day as their holy day, to comply with the Fourteenth Amendment's "equal protection" clause.

Massachusetts is one of the states which has an exception in Sec. 6 of Ch. 136 of the Massachusetts General Laws:

> Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby.

In interpreting this provision, however, the Massachusetts Supreme Judicial Court has ruled that the exception for "secular business" does not apply to keeping a store open

14. See footnote 7, *supra*.

on Sunday. *Commonwealth* v. *Has*, 122 Mass. 40 (1877). Under this interpretation by the highest state court, an observant Jew who keeps his shop open on Sunday violates the law. Hence, the exception set forth in Sec. 6 is not as broad as the prohibition and cannot save the statute from invalidity under the "equal protection" clause of the Fourteenth Amendment. This is true, independent of any consideration under the First Amendment.

Conclusion

State laws barring labor, business or work on Sundays are unconstitutional. The decision below holding the Massachusetts Lord's Day Act unconstitutional, under the First and Fourteenth Amendments, should therefore be affirmed.

Respectfully submitted,

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APPENDIX

(The Statute Involved)

MASSACHUSETTS GENERAL LAWS ANNOTATED
CHAPTER 136

OBSERVANCE OF THE LORD'S DAY

Section 1. Lord's day, definition.

The Lord's day shall include the time from midnight to midnight.

Section 2., Presence at games, sports, plays or public diversions on the Lord's day; exceptions.

Whoever on the Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock postmeridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sec-

tion twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said sections twenty-six to thirty-two are then in force. As amended St. 1933, c. 150, sec. 1; St. 1934, c. 63; St. 1935, c. 78; St. 1946, c. 207, sec. 1; St. 1955, c. 255, sec. 1; St. 1956, c. 11; St. 1956, c. 242; St. 1956, c. 256.

Section 3. Establishing and maintaining public entertainment on the Lord's day.

Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or public diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars. As amended St. 1955, c. 255, sec. 2.

Section 4. License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.

Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such

terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures for the benefit of patrons in a public dining room or for the use of television, the use of radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license

to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application. As amended St. 1945, c. 575; St. 1953, c. 596; St. 1954, c. 303; St. 1955, c. 742; St. 1956, c. 157; St. 1957, c. 300.

Section 4A. Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses; suspension; revocation.

The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely: Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commis-

sioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B. Added St. 1933, c. 150, sec. 2, as amended St. 1933, c. 309, sec. 1; St. 1946, c. 207, sec. 2.

Section 4B. Licenses for operation of bowling alleys on the Lord's day.

In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of its inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under this section if they have reason to believe that any provision of this section, or of any regulation or restriction prescribed thereunder, is being or will be violated. Added St. 1946, c. 207, sec. 3.

Section 5. Keeping open shops or warehouses and conducting business or doing work on the Lord's day.

Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

Section 6. Limit of operation of section 5.

The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale

of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in

interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains

from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. As amended St. 1932, c. 96; St. 1933, c. 150, sec. 3; St. 1934, c. 328, sec. 7; St. 1934, c. 354; St. 1934, c. 373, sec. 6; St. 1936, c. 129; St. 1937, c. 286; St. 1938, c. 143; St. 1943, c. 473; St. 1946, c. 207, sec. 4; St. 1949, c. 190; St. 1950,

c. 256, sec. 1; St. 1950, c. 322; St. 1950, c. 681; St. 1951, c. 504; St. 1954, c. 217; St. 1955, c. 304; St. 1957, c. 356, secs. 16, 17.

Section 7. Sale of frozen desserts, frozen dessert mix or confectionery on the Lord's day.

In Boston, and in any other city or town which accepts this and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit. As amended St. 1934, c. 328, sec. 8; St. 1934, c. 373, sec. 7; St. 1957, c. 356, sec. 18.

Section 8. Provisions of licenses to sell frozen desserts, ice cream mix or confectionery on the Lord's day; fee; revocation.

Every license granted under the preceding section shall specify the street or place and the number, if any, or if there is no number, the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Such licenses shall

expire on April thirtieth of each year; but they may be granted during April, to take effect on May first following. The fee for such license shall not be more than five dollars a year, and it may be suspended or revoked by the officer or board granting the same. As amended St. 1937, c. 124.

Section 9. Permit for performance of necessary work or labor on the Lord's day.

The police commissioner of Boston, or any member of the police department having a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued. As amended St. 1953, c. 108.

Section 10. Parades with music on the Lord's day.

Any post or camp of an incorporated organization of veterans of any war in which the United States has engaged, or any incorporated civic or fraternal organization, may parade with music on the Lord's day for the purpose of attending divine service, holding commemorative exercises or dedicating memorials; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

Section 11. Parades of policemen or firemen with music on certain Sundays.

Any company or association of policemen or firemen, whether in active service or former members of a police or fire department, may parade with music, in the case of policemen, on policemen's memorial day, the first Sunday of June in each year, and, in the case of firemen, on firemen's memorial day, the second Sunday of June in each year, for the special purpose of decorating the graves of deceased policemen or firemen, as the case may be; provided, that the music shall be suspended while passing within two hundred feet of any place of public worship where services are being held.

(*NOTE:* The remaining sections of Chapter 136—sections 12 to 32—are omitted because they have no relevance to the arguments made in this brief.)